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IN THE
COURT OF APPEALS OF INDIANA

MARK A. LEMERICK, Personal Representative of the Estate of DELORIS J. LANDIS,	)	
Appellant-Plaintiff,	)	
vs.	)	No. 48A05-0605-CV-275
JERRY JOHNS, DONNA JOHNS, FRANCES SHORES and SHARON PYLES,	)	
Appellees-Defendants.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Jack L. Brinkman, Judge
Cause No. 48D02-0302-PL-105

June 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-plaintiff Mark A. Lemerick, as the personal representative of the estate of Deloris J. Landis, appeals the trial court's judgment in favor of appellees-defendants Jerry Johns (Jerry), Donna Johns (Donna), Frances Shores (Frances), and Sharon Pyles (Sharon) (collectively, the appellees). The gravamen of Lemerick's argument is that the trial court erred by concluding that the appellees did not have a fiduciary relationship with Landis that was based on constructive fraud. Finding that a fiduciary relationship did not exist between the appellees and Landis, we affirm the judgment of the trial court.

FACTS

Landis was born on October 24, 1934, to Mary Alice Barkhimer and Glen Meredith. Barkhimer and Meredith had three more daughters—Donna, Frances, and Sharon—before divorcing in 1949. Meredith remarried Maude Meredith (Maude) in 1950. Landis, Donna, Frances, and Sharon lived with Barkhimer during their childhood, and the family had few economic resources. However, those difficult circumstances strengthened the sisters' relationship and made them "very close." Tr. p. 213. Donna married Jerry in 1958 at the age of twenty.

Meredith predeceased Maude, and Maude died testate on December 13, 2000. John Alton Taylor, a licensed attorney, was appointed the personal representative of Maude's estate, and Maude's will designated Landis as the sole residuary devisee. Upon learning of Maude's death, Taylor telephoned Landis and informed her that, after some specific bequests, Landis would be the primary beneficiary of Maude's estate. Landis immediately

telephoned Donna and told her that "she was going to share that inheritance with . . . her three sisters." Id. at 223.

Taylor met Landis and the appellees for the first time at Maude's home a few days after the funeral. When Taylor reiterated that Landis stood to inherit the majority of Maude's estate, she stated, "I can't understand why she left everything to me. . . . I [wish] that she had left it to me and my sisters." Id. at 178. Landis asked Taylor if she could share the inheritance with her sisters, and Taylor assured her that she could. Thereafter, Landis primarily communicated with Jerry—Donna's husband and Landis's only brother-in-law—regarding the specifics of inheritance and the gifting of the money to her sisters. Taylor frequently met with Landis and the appellees to discuss the details of the inheritance.

Jerry soon became concerned that Landis would not be able to give three-fourths of the inheritance to Donna, Sharon, and Frances without incurring federal gift tax consequences. Jerry questioned his daughter, Carla Bogger, who worked for a certified public accountant, and Bogger informed Jerry that a person could make up to a $10,000 gift to any individual per calendar year without federal gift tax implications.[1] Based upon this information, Jerry developed the idea of distributing the inheritance in $10,000 increments to multiple individuals who would regift the money to the sisters. Jerry asked the sisters to make a list of people to whom Landis could disperse the inheritance money. Between

[1] While Bogger's advice was correct, the 2001 federal tax laws also provided a $675,000 lifetime gift exemption for gifts between $10,000 and $675,000. Therefore, Landis could have gifted up to $675,000 to her three sisters without incurring federal gift tax consequences as long as she filed a return claiming the exemption. Tr. p. 291-93.

January and June 2001, Landis wrote thirty-nine checks to various individuals, totaling $352,350. Those individuals regifted the money to Donna, Frances, and Sharon.[2]

On January 18, 2001, Landis executed her last will and testament, in which she declared:

> I have three (3) sisters, [Frances] F. Shores; Sharon K. Pyles; and Donna C. Johns. I am to receive an inheritance from my stepmother Maude Meredith who died December 13, 2000. If I should die before I receive the inheritance from my stepmother's estate, I direct my personal representative to give three-fourths (3/4) of this inheritance to my three (3) sisters. The remaining one-fourth (1/4) interest in this inheritance shall go to my four children, share and share alike. If any of my sisters should predecease me, then that sister's share shall go to that sister's child or children.

Appellant's App. p. 66. Landis's will contained a self-proving certificate, which stated, in part, that Landis had executed the will freely and voluntarily with sound mind. Landis and two independent witnesses, Larry Robbins and Tina Keesling, signed the will.

Landis suffered a stroke on January 1, 2002, and eventually moved in with her son, Lemerick. On or about March 18, 2002, Landis executed a codicil for her will, which read:

> I hereby nominate and appoint my son, Mark A. Lemerick, as personal representative of this, my Last Will and Testament. In all other respects, I hereby confirm and republish my Last Will and Testament dated January 18, 2001.

Id. at 21. The codicil also contained a self-proving certificate, which stated that Landis executed the document freely and voluntarily with sound mind.

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[2] The trial court concluded that Jerry's main concern "was to insure that Deloris J. Landis would not have to pay any gift tax as a result of these gifts" and that the gifting scheme, "while not recommended, was not illegal." Appellant's App. p. 15.

Also in March 2002, Landis executed a power of attorney in favor of Lemerick. Shortly thereafter, Lemerick discovered that his mother had gifted portions of her inheritance from Maude's estate to her three sisters. On October 1, 2002, Lemerick filed a petition for the appointment of a guardian over Landis. The trial court did not hold a hearing and no medical statement from Landis's doctor was submitted regarding Landis's physical or mental condition. Nonetheless, the trial court issued an order appointing Lemerick as Landis's guardian on October 24, 2002.

As the guardian over Landis's estate and person, Lemerick filed the underlying complaint on December 6, 2002, naming the appellees and thirty-two other people as defendants. The complaint alleged conversion and fraud and requested an accounting of the appellees' assets as well as injunctive relief. On or about December 10, 2002, Donna received the complaint and reacted with "shock, amazement and anger." Id. at 24. Several days later, Donna visited Landis, showed her the complaint, and Landis "couldn't believe what [Lemerick] was doing and she wanted to know what she needed to do to get [the lawsuit] stopped." Tr. p. 254-55.

Lemerick told Landis that her "funds were running low," appellant's app. p. 25, and the lawsuit proceeded. Landis was deposed on December 22, 2004, and she stated that it was her idea that the inheritance from Maude's estate "would be split equally between [her] and [her] sisters." Tr. p. 86. She also stated that her funds were running low and that she wanted the money that had been distributed to her sisters returned but admitted that she had not

informed her sisters. Id. Landis died on October 10, 2005, and Lemerick was appointed as the personal representative of her estate on December 23, 2005.

A bench trial was held on January 18, 2006, and, at the conclusion of Lemerick's evidence, the trial court dismissed the claims against the thirty-two defendants except for the appellees. On April 3, 2006, the trial court issued its findings of fact, conclusions of law, and judgment, which included, in relevant part:

> 105. That Mark A. Lemerick told Deloris J. Landis that her funds were running low, yet there has been no inventory of assets and no accounting with respect to the income and expenses of Deloris J. Landis, nor was any evidence ever presented at trial by the Plaintiff of Deloris J. Landis' financial condition, despite evidence that Deloris J. Landis still retained an ownership interest in two parcels of residential real estate.
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> 106. The Court finds there was more than sufficient evidence to show that Deloris J. Landis was competent at the time she made the gifts from her own checking account maintained at the Independent Credit Union in January through June 2001.
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> 107. The Court finds that there was more than sufficient evidence to show that Deloris J. Landis intended to make the gifts to her three sisters; there was a transfer and delivery from Deloris to the respective payees named in each check; that there [was] acceptance by the recipients of the checks and by her three sisters; that the gifts were completed with nothing left undone and the gifts were immediate and absolute.
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> 108. The Court further finds that there was no evidence of any actual fiduciary relationship ever between any of the Defendants and Deloris J. Landis.
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> 109. There was no evidence of any promises, inducements, threats or coercion made by any of the Defendants to Deloris J. Landis which could even possibly create a constructive fiduciary relationship between Defendants and Deloris J. Landis.

Id. at 25. The trial court held that Lemerick had failed to prove all of the necessary elements of fraud and conversion, and, therefore, it entered judgment in favor of the appellees. Lemerick now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The trial court entered findings of fact and conclusions of law at the appellees' request pursuant to Indiana Trial Rule 52(A). Therefore, our standard of review is two-tiered: we first determine whether the evidence supports the trial court's findings and then we determine whether those findings support the judgment. Purcell v. S. Hills Invs., LLC, 847 N.E.2d 991, 996 (Ind. Ct. App. 2006). Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them, and the trial court's judgment is clearly erroneous if it is unsupported by the findings and the conclusions that rely upon those findings. Id.

In determining whether the findings or the judgment are clearly erroneous, we consider only the evidence favorable to the judgment and all reasonable inferences to be drawn therefrom. State v. Universal Outdoor, Inc., 864 N.E.2d 403, 406 (Ind. Ct. App. 2007). We do not reweigh the evidence or judge the credibility of witnesses, and we must affirm the trial court's decision if the record contains any supporting evidence or inferences. Id. While we defer substantially to findings of fact, we do not do so to conclusions of law. Carmichael v. Siegel, 754 N.E.2d 619, 625 (Ind. Ct. App. 2001). We evaluate questions of law de novo and owe no deference to a trial court's analysis of such questions. Id.

II. Fiduciary Relationship

Lemerick concedes that there was not an express fiduciary relationship between the parties. Appellant's Br. p. 8. However, he argues that the evidence at trial "established a relationship of trust and confidence between [Landis] and the [appellees], which relationship gave rise to a presumption of undue influence [and appellees] failed to rebut such presumption." Id. at 7.

"A plaintiff alleging the existence of constructive fraud has the burden of proving the existence of a duty owing by the party to be charged to the complaining party due to their relationship, and the gaining of an advantage by the party to be charged with fraud." Morfin v. Estate of Martinez, 831 N.E.2d 791, 802 (Ind. Ct. App. 2005). Constructive fraud "arises by operation of law from a course of conduct which, if sanctioned by law, would secure an unconscionable advantage, irrespective of the existence or evidence of actual intent to defraud." Paramo v. Edwards, 563 N.E.2d 595, 598 (Ind. 1990). It is "based on the premise that there are situations which might not amount to actual fraud, but which are so likely to result in injustice that the law will find a fraud despite the absence of fraudulent intent." Stoll v. Grimm, 681 N.E.2d 749, 757 (Ind. Ct. App. 1997).

Constructive fraud may be found where one party takes unconscionable advantage of his dominant position in a confidential or fiduciary relationship. Id. A confidential or fiduciary relationship exists when confidence is reposed by one party in another with resulting superiority and influence exercised by the other. Drudge v. Brandt, 698 N.E.2d 1245, 1250 (Ind. Ct. App. 1998). The question of whether a confidential relationship exists

is one of fact to be determined by the finder of fact. Dawson v. Hummer, 649 N.E.2d 653, 661 (Ind. Ct. App. 1995). If the plaintiff meets the burden of proof with respect to establishing the existence of a fiduciary relationship, there is a presumption of fraud in the challenged transaction. Id. At that point, the burden shifts to the defendant to prove at least one of the following by clear and unequivocal proof: (1) that he or she made no deceptive material misrepresentations of past or existing facts or did not remain silent when a duty to speak existed; (2) that the complaining party did not rely on any such misrepresentation or silence; or (3) that no injury proximately resulted from the misrepresentation or silence. Morfin, 831 N.E.2d at 802.

Lemerick argues that the parties' "relationship itself" resulted in the appellees' fiduciary relationship with Landis. Appellant's Br. p. 13. As support for his argument, Lemerick notes that Jerry advised Landis on various matters unrelated to the inheritance, including the sale of real estate, estate administration, and tax liability. Regarding the inheritance, Lemerick argues that Landis never met with Taylor without the appellees being present and that Jerry orchestrated the transfers and devised the tax scheme to "take advantage of [Landis's] frail personality." Id.

While the evidence presented at trial clearly established that Landis respected the appellees' opinions regarding her personal affairs, it does not automatically follow that such a relationship created a fiduciary duty between the parties. As noted above, the initial burden was on Lemerick to show that Landis confided in the appellees to act in her best interest and,

instead, the appellees abused Landis's trust and used the resulting superiority to their advantage.

At trial, evidence was presented that Landis took "care of her own affairs" but would contact Jerry when she had questions about work benefits or insurance. Tr. p. 24, 41. Landis filed her own taxes, paid her own bills, managed her own finances, and did not grant the appellees the power of attorney. Id. at 41-42, 68. The appellees never requested money from Landis in return for their help with her personal affairs, and they refused to accept compensation for their help even when she offered "on occasion." Id. at 42. The evidence further showed that Landis was an independently-minded woman who did not always take the appellees' advice. For example, Jerry advised Landis against selling her home, but Landis "did it any way [sic]." Id. at 60.

Regarding Landis's inheritance and her decision to share the money with her sisters, Taylor—the personal representative of Maude's estate—testified that he "saw nothing that indicated that [the appellees] were able to influence [Landis]. [Landis] seemed to know what she wanted to do." Id. at 189. From the moment that Landis learned that she was the primary beneficiary of Maude's estate, she informed both Taylor and the appellees that she intended to split the inheritance equally with her sisters. While Taylor testified that the appellees—specifically, Jerry—helped Landis distribute the inheritance because she was "naïve [and] lack[ed] business experience[,]" he also commented that Landis "seemed very much aware of what she [was doing and] just seemed intent that she wanted to share that money with her sisters." Id. at 188-89.

In sum, ample evidence was presented at trial to support the trial court's ultimate conclusion that it was Landis's personal decision to share her inheritance equally with her sisters. While it is obvious that Landis had a very close relationship with the appellees, the evidence does not demonstrate that the parties had a fiduciary relationship creating a presumption of fraud. Landis, Donna, Frances, and Sharon had a lifelong bond built not only on sisterhood but also on friendship. And Landis had known Jerry since he became her brother-in-law in 1958 and, in her own words, "cared a lot for him." Id. at 97. While Landis clearly trusted the appellees and valued their opinions regarding her personal matters, the record shows that she was an independent, kind, and generous woman who decided to share her inheritance with her sisters because, as she stated in her deposition, she "love[d] them all." Id. at 78. No evidence was presented that the appellees took advantage of Landis to get a portion of the inheritance; instead, the evidence indicates that the appellees helped Landis distribute the money in accordance with her desires.

Because Lemerick did not prove that Landis trusted the appellees to act in her best interest and, instead, the appellees used Landis's trust to their advantage, it was not error for the trial court to conclude that a fiduciary relationship did not exist between Landis and the appellees. Therefore, the burden never shifted to the appellees to rebut a presumption of fraud. Lemerick's assertions to the contrary are an invitation for us to reweigh the evidence and assess the credibility of witnesses—a practice in which we do not engage on appeal when deciding an issue of fact, such as whether a fiduciary relationship existed between the parties.

The judgment of the trial court is affirmed.

FRIEDLANDER, J., and CRONE, J., concur.